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Nos. 88-967 and 88-1027

In the Supreme Court of the United States

OCTOBER TERM, 1988

FRANK SCOTTO AND ROBERT COAR, PETITIONERS

v.

UNITED STATES OF AMERICA

KENNETH P. ZAUBER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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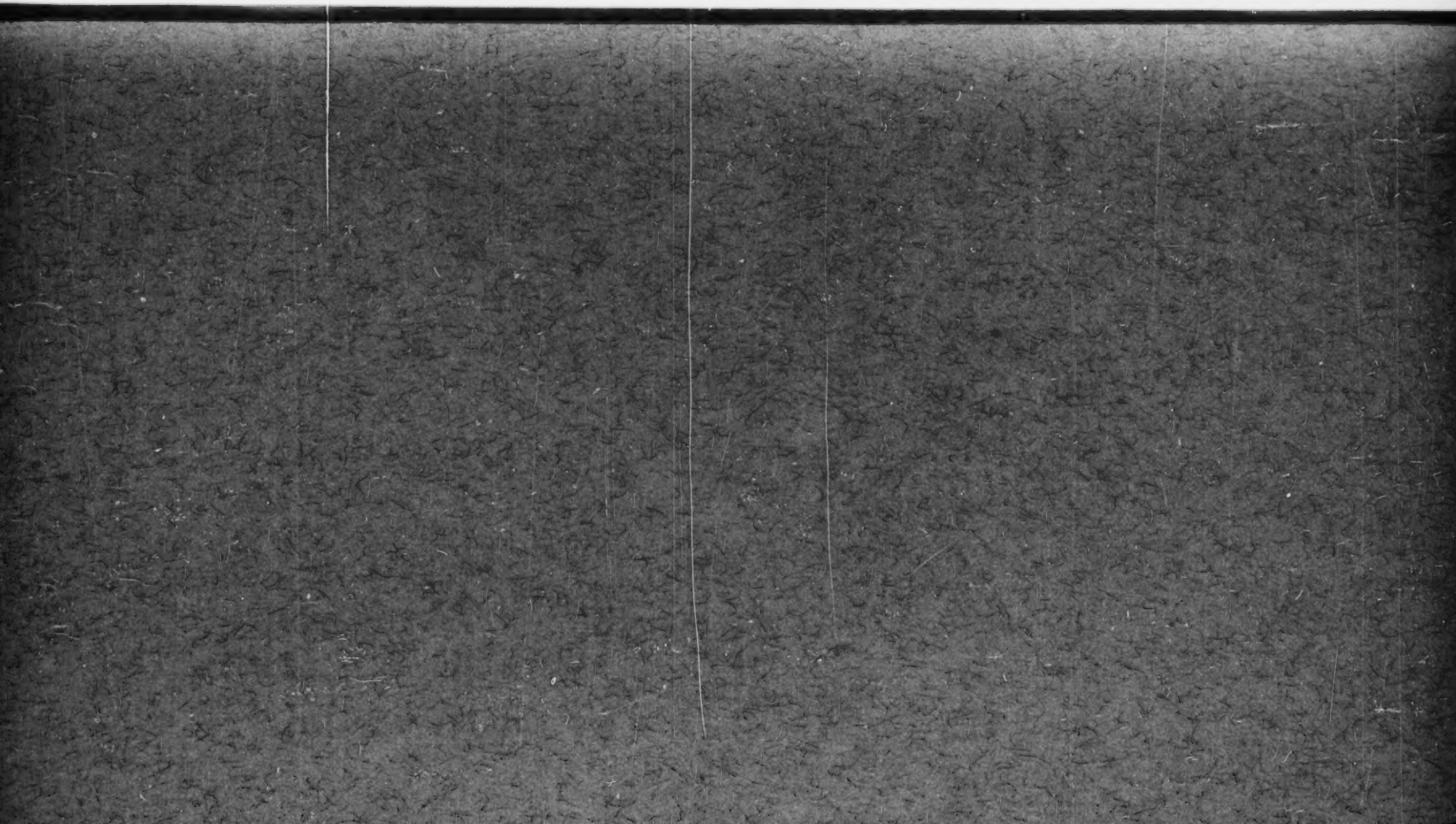

QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that petitioners' RICO conspiracy convictions rested on jury findings of valid predicate acts of racketeering.

2. Whether the evidence established a sufficient nexus between the RICO enterprise and the predicate acts of accepting kickbacks.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-967

FRANK SCOTTO AND ROBERT COAR, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 88-1027

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UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-38a)[1] is reported at 857 F.2d 137.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1988. Petitions for rehearing were denied on November 10, 1988. The petition for a writ of certiorari in

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[1]"Pet. App." refers to the appendix to the petition in No. 88-967.

No. 88-967 was filed on December 10, 1988, and the petition for a writ of certiorari in No. 88-1027 was filed on December 17, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted of conspiring to violate the Racketeer Influenced and Corrupt Organizations (RICO) statute, in violation of 18 U.S.C. 1962(d). Petitioners Scotto and Coar were also convicted on two counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of wire fraud, in violation of 18 U.S.C. 1343. In addition, petitioner Zauber was convicted on one count of mail fraud and one count of accepting kickbacks in connection with an employee pension benefit plan, in violation of 18 U.S.C. 1954. Each petitioner was sentenced to four years' imprisonment and fined $25,000. The court of appeals reversed the mail and wire fraud convictions in light of *McNally* v. *United States*, 483 U.S. 350 (1987), but affirmed the RICO conspiracy convictions and petitioner Zauber's conviction for accepting kickbacks. Pet. App. 3a-38a. The court of appeals then remanded the case to the district court for resentencing on the affirmed counts.

1. The evidence at trial, which is summarized in the opinion of the court of appeals (Pet. App. 6a-9a), showed that petitioners and others planned and executed a kickback scheme involving pension fund money. Petitioners Scotto and Coar were lifetime trustees of the employee pension benefit plan for Local 701 of the International Brotherhood of Teamsters. Petitioner Zauber became general counsel to the pension fund in 1979, replacing David Friedland. In 1980, Friedland was con-

victed of receiving kickbacks in connection with a loan of pension fund monies. *Id.* at 6a.

In the spring of 1982, Friedland agreed with Joseph Higgins that they would try to obtain money from the pension fund to invest in Higgins' Omni Funding Group, a Florida-based mortgage company. Friedland was to be a partner in Omni, but because of his earlier conviction, his interest was to be hidden. Friedland told Higgins that he would discuss the matter with Scotto and Coar. Friedland later reported back to Higgins that Omni would have to pay kickbacks to Scotto and Coar to obtain the money. Pet. App. 6a.

Higgins mailed an investment proposal to the pension fund in June 1982. After a formal presentation, Higgins entered into negotiations with the trustees of the fund. Zauber conducted a superficial "due diligence" investigation of Higgins and Omni and reported favorably on them. Sometime after the presentation, Higgins, Friedland, Scotto, and Coar met at a New York restaurant so that Scotto and Coar could meet in person with Higgins and discuss the Omni investment. Pet. App. 6a-7a.

At some point, pension fund manager Alfred Piperata became suspicious of Higgins and conducted his own investigation. His inquiry revealed Higgins' prior bankruptcy, tax, and repossession problems, as well as his longtime friendship with David Friedland. When Piperata expressed concern to petitioners, he was told not to worry. Pet. App. 6a-7a.

In October 1982, Higgins and the pension fund entered into a formal contract. The pension fund agreed to transfer $20 million to Omni for 30 years; the fund transferred the money from its investment with the Magten Asset Management Corporation. On loans made with the money for residential mortgages, the pension

fund was to get a return one percent higher than the six-month treasury bill rate; on commercial mortgages, the fund was to receive a return two percent higher than the treasury rate. Omni was to retain any profit above those rates. The contract also provided that commercial loans using the pension fund's money could not exceed ten percent of the corpus, that residential loans were to require 100% insurance and commercial loans 15% insurance, and that individuals with prior convictions, such as David Friedland, were barred from any involvement in Omni. Zauber's fiancee, an associate at a Wall Street law firm, reviewed the contract. Pet. App. 7a.

In late November 1982, Omni was having trouble obtaining insurance on the loans. Higgins proposed changing the investment contract to allow Omni to hold back 15% of each loan in lieu of obtaining insurance or a letter of credit. Zauber approved Higgins' proposed amendment of the contract. Pet. App. 8a.

Higgins, Scotto, Coar, and Friedland had a second meeting in late 1982. At that meeting, Friedland requested that Scotto and Coar communicate with Omni through him rather than through Higgins. Friedland also discussed kickbacks and told Scotto and Coar that their share would come from his half of Omni's profits. Pet. App. 8a.

Beginning in late 1982, Zauber approached Higgins for money on at least six occasions. Higgins repeatedly directed Zauber to Friedland. Higgins also gave Friedland money to pay off Zauber, Scotto, and Coar. Pet. App. 8a.

In January 1983, four new trustees joined Scotto and Coar on the board of the pension fund. The new trustees were told that the old trustees (Scotto and Coar) would be solely responsible for any liability on prior investments and would continue to monitor them. In late 1983, however, the new trustees became aware of their own

responsibility, as fiduciaries, for continuing investments made by the fund. They also learned that, while Omni was paying approximately a 9% return to the fund on the $20 million the fund had placed with Omni, the money invested in the Magten Asset Management Corporation (from which the $20 million for Omni had been withdrawn) was paying 17%. Upon further investigation, the new trustees discovered that Omni had been violating the investment contract by making loans in excess of the ten percent corpus limit. Higgins, Friedland, and Zauber attempted to cover up those loans by backdating a letter from Zauber authorizing loans in excess of the limit. The new trustees also discovered that many of Omni's loans were in default and that Omni was making interest payments to the pension fund from the 15% holdback accounts, in violation of the investment contract. After the Department of Labor initiated an investigation, Scotto and Coar resigned as trustees, Zauber was fired, and the new trustees terminated the pension fund's investment contract with Omni. Pet. App. 9a.

2. The RICO conspiracy count of the indictment alleged that petitioners agreed to participate in the conduct of an "enterprise"—the Omni Funding Group—through a pattern of racketeering activity. The predicate acts of racketeering were alleged to be mail fraud, wire fraud, and numerous violations of 18 U.S.C. 1954, which makes it a crime for persons involved in the operation of an employee pension benefit plan to receive or to agree to receive or to solicit kickbacks in exchange for their influence in those operations. The jury, which convicted petitioners on all counts, did not return a special verdict expressly indicating which of the predicate acts of racketeering it relied on in convicting petitioners on the RICO conspiracy count.

3. The court of appeals reversed petitioners' mail and wire fraud convictions in light of *McNally* v. *United*

States, supra, but it affirmed petitioners' RICO conspiracy convictions and petitioner Zauber's conviction under 18 U.S.C. 1954. With respect to the RICO conspiracy charge, the court rejected (Pet. App. 31a-37a) the contention that the convictions had to be reversed because, as petitioners alleged, the jury might have relied on the invalid predicate acts charging mail and wire fraud. The court concluded (*id.* at 31a-32a)—based on the indictment, the jury instructions, and the verdicts—that it was clear that the jury found that each petitioner agreed to the commission of at least two valid predicate acts of receiving kickbacks. The court thus rejected petitioners' argument "[b]ecause the jury necessarily did not rely on the invalid mail and wire fraud violations." *Id.* at 37a.

The court also rejected (Pet. App. 26a-27a) the claim that the evidence was insufficient to establish that petitioners agreed to participate in the affairs of Omni through a pattern of racketeering activity. Petitioners contended that the evidence failed to show that they were aware that Omni was making loans in violation of the investment contract and using the holdback accounts of loans in default to make interest payments to the pension fund. The court concluded (*ibid.*) that, although petitioners may not have known what loans Omni made and to whom, they nonetheless agreed to participate in the affairs of Omni through racketeering acts by providing Omni with $20 million in capital from the pension fund in return for kickbacks.

ARGUMENT

1. Petitioners renew their claim (88-967 Pet. 15-22; 88-1027 Pet. 15-43) that their RICO conspiracy convictions must be reversed because it is impossible to determine from the jury's general verdict whether the jury relied

on the invalid mail and wire fraud allegations as predicate acts in finding them guilty. Petitioners rely on the principle—recognized in such cases as *Stromberg* v. *California,* 283 U.S. 359 (1931), *United States* v. *Brown,* 583 F.2d 659 (3d Cir. 1978), cert. denied, 440 U.S. 909 (1979), and *United States* v. *Holzer,* 840 F.2d 1343 (7th Cir. 1988)—that if a jury is provided with alternative grounds for conviction, if one of the grounds is invalid, and if it is impossible to determine which ground the jury relied on, then the conviction must be vacated because the jury might have relied on the invalid ground. The court of appeals in this case expressly applied that principle (Pet. App. 31a-32a) but found that reversal was not required because the jury necessarily concluded that each petitioner agreed to the commission of at least two valid predicate acts of receiving kickbacks. That essentially factual determination was correct and does not warrant this Court's review.

The district court instructed the jury (C.A. App. 1006-1008) that in order to convict petitioners on the mail and wire fraud counts it must find "an agreement by [each petitioner] to receive illegal cash payments" and thus that "the mailing was in furtherance of a kickback scheme." See Pet. App. 32a-33a. From the convictions of petitioners on those counts, it is clear that the jury concluded that each petitioner agreed that he would receive at least one kickback. That the jury so concluded is equally clear from petitioners' convictions for RICO conspiracy, because the district court instructed the jury (C.A. App. 991-992) that it could not convict petitioners of that offense without finding that each petitioner solicited, agreed to receive, or received "concealed payments." See Pet. App. 32a-33a. Accordingly, having found a conspiracy pursuant to which each petitioner agreed to receive at least one

kickback personally, the jury necessarily found an agreement among petitioners to receive multiple kickbacks.

That finding, as the court of appeals concluded (Pet. App. 32a), suffices to support the RICO conspiracy convictions and to satisfy the *Stromberg* principle. The multiple kickbacks to which petitioners agreed were valid predicate acts, independent of the invalid mail and wire fraud offenses. And as the district court correctly instructed the jury (C.A. App. 1000), in order to prove a defendant guilty of RICO conspiracy, the government need not show that "he agreed to personally commit * * * any racketeering acts"; rather, it need only show that "he agreed to the commission of two or more of those acts by any member of the conspiracy to further the criminal goals of the enterprise * * *." See *United States* v. *Kragness,* 830 F.2d 842, 860 (8th Cir. 1987); *United States* v. *Neapolitan,* 791 F.2d 489, 494-498 (7th Cir.), cert. denied, 479 U.S. 940 (1986); *United States* v. *Joseph,* 781 F.2d 549, 554 (6th Cir. 1986); *United States* v. *Adams,* 759 F.2d 1099, 1116 (3d Cir.), cert. denied, 474 U.S. 906 (1985); *United States* v. *Tille,* 729 F.2d 615, 619 (9th Cir.), cert. denied, 469 U.S. 845 (1984); *United States* v. *Carter,* 721 F.2d 1514, 1528-1531 (11th Cir.), cert. denied, 469 U.S. 819 (1984).[2]

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[2] The RICO conspiracy count alleged as predicate acts of racketeering that each petitioner agreed to commit *multiple* violations of 18 U.S.C. 1954. Petitioner Zauber argues (88-1027 Pet. 30-34) that the agreements to accept kickbacks cannot support his RICO conspiracy conviction because it is impossible to know if the jury "achieved unanimity as to any specific violation of section 1954" (*id.* at 31). As we have shown, it necessarily follows from the district court's instructions and the jury's verdict that the jury unanimously found that each petitioner, as part of the overall conspiracy, agreed to the commission of at least two acts of accepting kickbacks. That finding was itself sufficient to support the RICO conspiracy convictions. The jury need not, in order for those convictions to be upheld, have reached any

Petitioner Zauber argues (88-1027 Pet. 24-28) that review is warranted because two court of appeals decisions—*United States* v. *Winter,* 663 F.2d 1120, 1136 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983), and *United States* v. *Ruggiero*, 726 F.2d 913 (2d Cir.), cert. denied, 469 U.S. 831 (1984)—express the view that a defendant must agree to commit two predicate acts of racketeering personally in order to be convicted of RICO conspiracy. That question is not properly before this Court, however, because petitioners did not object to the RICO conspiracy instruction in the district court and thus have waived the issue. See Pet. App. 34a n.17. In any event, the First and Second Circuit interpretation of Section 1962(d), which petitioner does not defend, is incorrect: RICO conspiracy incorporates the ordinary principle of conspiracy law that each conspirator must agree only that he will "participate in the conspiracy with knowledge of [its] essential objectives" (*United States* v. *Carter,* 721 F.2d at 1528 n.21), not that he will himself perform the illegal acts that constitute the conspiracy's objectives. As we have noted, the overwhelming majority of the circuits have so held. Furthermore, the *Winter* and *Ruggiero* decisions do not create a conflict that warrants this Court's review.

Although *Winter* contains language requiring that RICO conspirators agree to commit predicate acts personally, the issue was not presented in that case. The jury in *Winter* was in fact instructed that conviction required an agreement to commit two predicate acts personally. The defendants argued on appeal that RICO conspiracy requires more—the actual personal commission of two predicate acts of racketeering. The First Circuit rejected that argument. The court's broader statement that a RICO

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agreement as to whether any specific violation of Section 1954 was ever actually committed.

conspiracy requires an agreement to commit two or more predicate acts personally is therefore dictum. The court had no occasion to consider the sufficiency of an agreement that co-conspirators commit the predicate acts.

The Second Circuit in *Ruggiero*, unlike the First Circuit in *Winter,* reversed a conviction for RICO conspiracy, but the court's analysis of the RICO conspiracy issue was not necessary to its decision. The issue of the proper construction of the RICO conspiracy statute, 18 U.S.C. 1962(d), arose in connection with the appeal of defendant Tomasulo. The indictment charged Tomasulo with RICO conspiracy, based on two predicate acts. One of the two predicate acts was held to be legally insufficient on appeal: the court concluded that that alleged predicate act did not qualify as an act of racketeering at all. For that reason, Tomasulo's conviction was invalid without regard to whether he had agreed to commit that act himself or had simply agreed that the act would be committed by one of his co-conspirators. In either case, the agreement that he was alleged to have entered included only one valid act of racketeering, and it was thus not a violation of Section 1962(d).

Finally, the *Ruggiero* case, like the *Winter* case, was decided before the issue had been presented to and considered by other courts. The *Ruggiero* court stated that it based its conclusion that a defendant must at least agree to commit two or more predicate crimes himself on the absence of controlling contrary authority. 726 F.2d at 921. At the time *Ruggiero* was decided, there was no contrary authority at all,[3] and the court considered its construction

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[3] The Second Circuit decided *Ruggiero* just five days after the Eleventh Circuit's decision in *United States* v. *Carter, supra,* and evidently was not aware of that decision.

of Section 1962(d) to be required by "[p]revailing case law" (726 F.2d at 921). Since that time, all six circuits to consider the issue have ruled contrary to the Second Circuit. Because of that new case law, the Second Circuit might well reconsider its decision on this issue when presented with an opportunity to do so. This Court has denied certiorari on the same issue in several cases. *Finestone* v. *United States*, No. 87-5298 (Nov. 9, 1987); *Stewart* v. *United States*, 480 U.S. 919 (1987); *Neapolitan* v. *United States*, 479 U.S. 940 (1986); *Messino* v. *United States*, 479 U.S. 939 (1986); *Adams* v. *United States*, 474 U.S. 971 (1985); *Tille* v. *United States*, 469 U.S. 845 (1984); *Carter* v. *United States*, 469 U.S. 819 (1984). No different result is warranted here.[4]

2. Petitioners Scotto and Coar argue (88-967 Pet. 23-33) that there was no sufficient nexus between the RICO enterprise and the predicate acts of racketeering. They do not dispute the sufficiency of the evidence that they agreed to engage in a pattern of racketeering activity consisting of the receipt of kickbacks in violation of 18 U.S.C. 1954. They contend, however, that there was an insufficient nexus between Omni (the RICO enterprise) and their agreements to receive kickbacks (the racketeering acts), because they participated in the affairs of Omni, not through their agreements to receive kickbacks, but through the investment of the $20 million, which was not a

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[4] In the court of appeals, petitioners unsuccessfully argued that the evidence fell short of establishing a pattern of racketeering activity within the meaning of the RICO statute, 18 U.S.C. 1961(5), because all of the alleged predicate offenses were part of a single overall scheme. The issue whether a RICO pattern of racketeering requires multiple separate schemes is currently before this Court in *H.J., Inc.* v. *Northwestern Bell Tel. Co.*, cert. granted, No. 87-1252 (Mar. 21, 1988). Petitioners, however, have not raised that issue in their petitions.

racketeering act. The court of appeals correctly rejected that contention. Pet. App. 28a-29a.

The RICO statute makes it a crime for a person associated with an enterprise whose activities affect commerce "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity * * *." 18 U.S.C. 1962(c). To establish the required nexus ("participate * * * through * * * racketeering") between a legitimate RICO enterprise and the acts of racketeering committed by a defendant, the government must show either that the defendant was "enabled to commit the predicate offenses *solely by virtue of his position in the enterprise* or involvement in or control over the affairs of the enterprise" or that "the predicate offenses are related to the activities of the enterprise." *United States* v. *Robilotto,* 828 F.2d 940, 947-948 (2d Cir. 1987), cert. denied, No. 87-923 (Jan. 11, 1988), quoting *United States* v. *Scotto,* 641 F.2d 47, 54 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981). Accord *United States* v. *Jannotti,* 729 F.2d 213, 226 (3d Cir.), cert. denied, 469 U.S. 880 (1984). Or, as the court of appeals stated in *United States* v. *Cauble,* 706 F.2d 1322, 1333 (5th Cir. 1983) (footnote omitted), cert. denied, 465 U.S. 1005 (1984), the government must show that "the defendant's position in the enterprise facilitated his commission of the racketeering acts" and that "the predicate acts had some effect on the lawful enterprise." Accord *United States* v. *Horak,* 833 F.2d 1235, 1239 (7th Cir. 1987). See also *Yellow Bus Lines, Inc.* v. *Local Union 639,* 839 F.2d 782, 793 (D.C. Cir. 1988) (declining "to adopt a more restrictive standard than that enunciated in *Cauble* and *Scotto*").

Under the foregoing standards, the nexus between Omni and the predicate acts of receiving kickbacks was clearly sufficient. Petitioners Scotto and Coar were enabled to

obtain the kickbacks by virtue of their association with Omni as trustees of a pension fund investing $20 million in the company.[5] Moreover, as the *quid pro quo* for the $20 million investment, the receipt of the kickbacks manifestly affected Omni and was related to its activities. Just as the payment of kickbacks by Higgins and Friedland furthered the enterprise, so too did the other side of the same transaction—the receipt of those payments by petitioners Scotto and Coar. Indeed, the courts have repeatedly found a sufficient nexus between the enterprise and the pattern of racketeering in bribery cases involving outsiders who pay bribes to the enterprise or who receive bribes from it. See, *e.g.*, *United States* v. *Yonan*, 800 F.2d 164, 168 (7th Cir. 1986), cert. denied, 479 U.S. 1055 (1987); *United States* v. *Lee Stoller Enterprises, Inc.*, 652 F.2d 1313, 1320-1321 (7th Cir.), cert. denied, 454 U.S. 1082 (1981); *United States* v. *Bright*, 630 F.2d 804, 831 (5th Cir. 1980); *United States* v. *Forsythe*, 560 F.2d 1127, 1136 (3d Cir. 1977).[6]

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[5] The RICO statute applies to outsiders, including those who merely conduct business with the enterprise. See, *e.g.*, *United States* v. *Yonan*, 800 F.2d 164, 167 (7th Cir. 1986), cert. denied, 479 U.S. 1055 (1987); *United States* v. *Elliott*, 571 F.2d 880, 903 (5th Cir.), cert. denied, 439 U.S. 953 (1978).

[6] Petitioners' reliance (88-967 Pet. 26-29) on *United States* v. *Nerone*, 563 F.2d 836 (7th Cir. 1977), cert. denied, 435 U.S. 951 (1978), and *United States* v. *Mandel*, 591 F.2d 1347 (4th Cir. 1979), cert. denied, 445 U.S. 961 (1981), is misplaced. Neither case raised the issue of the sufficiency of the nexus between an enterprise and the predicate acts of racketeering in a situation in which the defendant was an outsider who received bribes from the enterprise. In *Nerone*, the court found no evidence of a nexus between illegal gambling conducted at a trailer park and the legitimate corporation that operated the park, ruling that mere "[g]eographical juxtaposition of the enterprises is insufficient." 563 F.2d at 852. In *Mandel*, the court contrasted the investment of funds in a business with the transfer of an interest out of the business and held that "the simple transfer of an ownership interest in [a legitimate] business does not constitute the

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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FEBRUARY 1989

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conduct of the business through a pattern of racketeering activity even if the transfer is part of an alleged payoff in a mail fraud scheme." 591 F.2d at 1376.

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